MISCELLANY.

REJECTING PRECEDENTS.—One of the justices of the New York Supreme Court is reported by the New York *Tribune* as using the following language:

"I have not deemed it necessary to cite authorities in support of the specific views which I have expressed. It is enough that they must commend themselves to the rational mind. It seems to be considered in some quarters that judges should not think any more on their own account; that they should spend their lives mousing through mouldy libraries in search of what other judges in a less enlightened age have said, not even upon the immediate question in hand, but upon some matter more or less distantly related. It is thought to be presumption to let one's own bucket down into the living well of reason, instead of being content to lick up from the muddy, trampled earth around it the green and stagnant leakings of the past. And so the science of law, which was once deemed the perfection of human reason, is being left behind by every other science."

The specific case before the justice was one in which precedents were urged as tending to establish the right to recover $75,000 damages for injury to a farm w ich was worth but $6,500 before it was injured. In such a case the language of the justice is none too strong. There is certainly a tendency among some of our judges to follow precedents too slavishly. When a judge can see with clearness the true principle on which a case ought to be decided, the law is the gainer if he has the courage to decide accordingly, notwithstanding some ancient precedent to the contrary. Here, as in multitudes of other situations, the true rule is found in the old and honored. but not entirely specific, injunction: "Be bold, be bold, but not too bold." After all, the question comes back to the quality of the judge himself. A great judge will not be afraid to reject a precedent that is palpably wrong, though he may be very conservative where the matter is at all doubtful.—*Case and Comment.*

INSTRUCTIONS TO JURIES.—Illinois practitioners are not alone in their jeremiads about the system of written instructions to juries. The two Virginias seem to be in the same predicament, according to the plaint of Mr. W. G. Mathews, of Charleston, W. Va., contributed to the December VIRGINIA LAW REGISTER. "Among the many pitfalls of trial practice (says Mr. Mathews) yawning for both the young and the old practitioner in the two Virginias, it is doubtful whether there is any which engulfs more, and results in so many reversals of our *nisi prius* courts, as that of special instructions to the jury." "'Tis the sport to have the engineer hoist with his own petard."

We cannot follow the writer in all the instances of refinement, by which the Virginia courts are in the habit of destroying judgments, built up after days and weeks of trial. Among other instances, we point out, that in a conflict of evidence, where the principles of law applicable to the several theories of the case, are different, it is error for the court to give an instruction, applicable only to the theory of the offering party. In other words, the practical effect is that each instruction must be complete in itself, and correct on the facts of the case. Nor can an instruction, bad in this respect, be made good by other instructions, given on behalf of the other party.

In the Illinois jurisdiction we have got beyond that confusion. Instructions are now treated as an entirety—but it took many sledge-hammer blows (some dealt in the columns of this journal) to bring about this reform. It is a sad spectacle to look through the West System of Reports and witness the myriads of cases in most of the American courts, where the system of written instructions prevails, wherein reversed judgments are piled up in confusion by reason of the rude reversals of bigoted reviewing courts.

The editor of the VIRGINIA LAW REGISTER calls special attention to the article of Mr. Mathews. He mollifies his criticism by saying that the present judges are not responsible for this state of affairs. "It is an inheritance from the great ones of the past—and, we believe, exists only in Virginia." But why should not the present judges change the system? It is judge-made law, and when it proves noxious, why should it not be undone? It is useless to mince words—the system, as practiced in many of the States, is unworthy of an enlightened procedure. It is more than that- it is a reflection on the common sense of the American judiciary. The bludgeon strokes of a Jeremiah Bentham are necessary to hew down the whole vicious system. Common sense must be once more enthroned in the conference chambers of the American judiciary.—*National Corporation Reporter.*

LIABILITY FOR DAMAGES CAUSED BY UNLAWFUL ACTS.*—The principle on which liability is imposed for damages resulting, as the unforeseen consequences of unlawful acts, has never been exactly defined. A recent decision suggests an important distinction between those cases where the unlawful act is morally wrong and those where it is merely in the nature of a public tort. *Osborne* v. *Van Dyke* (Iowa), 85 N. W. 784. The defendant, while beating his horse with a pointed stick, slipped, and thereby accidentall struck the plaintiff. The court held that if the defendant was breaking a statute forbidding cruelty to animals, and the plaintiff's damage was a direct consequence of his act, he was liable even though the damage could not reasonably have been foreseen.

It is commonly admitted at the present day that the general ground for liability in tort is damage directly caused to person or property by blameworthy conduct on the part of another as regards that person or property. This principle seems to have been reached, both consciously and unconsciously, on the theory that human activity is to be encouraged, and, consequently that loss should be allowed to rest where it falls, if the party causing it has been blameworthy towards the party damaged, only in having been active. Two exceptions to this rule, in cases of unlawful acts, apparently exist. In the first place, where a defendant is engaged in some act unlawful because of its morally wrong nature, he is made liable for any damage directly resulting from the act. Although considerable doubt has been thrown on this proposition (Terry's Leading Principles of Law, 555), yet it appears to have been followed by the few decisions in point, and to have a rational foundation. *James* v. *Campbell*, 5 C. & P. 372. The reason for not holding liable a defendant who has merely been active in causing damage, namely, that human activity is to be encouraged, entirely fails where we find that the activity was of a criminal

[* See Va. Code, sec. 2900; 4 Va. 702, 788; 7 Va. Law Reg. 66; Washington etc. R. Co. *v.* Lacey, 94 Va. 460.—EDITOR VA. LAW REGISTER.]

nature. In the second place, where there is a breach of a statute forbidding or ordering an act which is not immoral, but which constitutes merely a public tort, there is liability for damages resulting, provided the injured party is of that class which the statute was designed to protect. *Gorris* v. *Scott*, L. R. 9 Ex. Div. 125; *Atkinson* v. *Newcastle Waterworks Co.*, L. R. 2 Exch. 441. This limitation seems extremely wise, whether liability in such cases is founded on the statute of Westminster, ii c. 50, in which case it would logically follow, or, as seems more probable, is purely judge-made. It would be impolitic, and contrary to the guiding principle of torts to hold one who, without moral wrong, broke a statute, of the existence of which he may have been ignorant, liable for damages not intended to be guarded against by the statute, and perhaps not to have been foreseen as possible.

While most of the decisions accord with the principles here laid down, yet as the courts state no clear distinction between the two classes of cases, errors are likely to result. In the principal case, for example, the court supports its decision by citing cases where damage resulted from statutory torts. It is clear, however, that the statute here involved was not intended for the plaintiff's protection, and, therefore, that the plaintiff's recovery, which seems proper, must depend on the fact that the defendant was committing a morally criminal act, and could properly be held to act at his peril.—*Harvard Law Review.*

BLIND CONSERVATISM IN ADMINISTERING CRIMINAL LAW.—The decision of the Supreme Court of West Virginia in *State* v. *Sheppard* (39 S. E. 676) illustrates the blind conservatism with which the criminal law is still administered in some jurisdictions. On the trial of the defendant for a felony, before his entrance into court a witness had been asked her me and that of her husband. The prisoner's absence was then noticed and he was brought into court and the same questions were repeated and the same answers were given. The appellate court had the hardihood to hold that the taking of such testimony in the prisoner's absence amounted to reversible error. This is the most barrenly technical, the most absurd decision that has come to our notice for a long period.

In our own State two decisions of the Court of Appeals have administered the rule, requiring a prisoner's presence during his trial, justly and according to common sense. In *Maurer* v. *The People* (43 N. Y. 1) it appeared that in a trial for murder, after the jury had retired to deliberate upon their verdict, they returned into court and asked certain questions of the court as to what had been the evidence on particular points, to which the court replied, giving the information requested. It was held that this was a proceeding upon the trial within the statute, and, the prisoner not having been present, there was error, for which his conviction must be reversed. In *People* v. *Bragle* (88 N. Y. 585) the Maurer case was distinguished. It appeared that during the trial the prisoner, wishing to communicate with a witness by a telephone which was in an anteroom connecting with he court room by swinging doors and within call, started to go to it for that purpose. The district attoruey objected, but the prisoner went, and was absent about five minutes, during which time his counsel continued the cross-examination of a witness. It was held that this was not a violation of the statutory provision that

no person can be tried for a felony unless he be personally present during such trial; that said provision was intended for the protection of the prisoner, and a substantial performance was all that was required.

Another illustration of the administration of legal guarantees for a prisoner's protection according to justice and the substantial end in view, was afforded by contrasting *People* v. *Murray* (Mich., 50 N. W. R. 995) and *People* v. *Kerrigan* (73 Cal. 222), which considered the right to a public trial. In the Michigan case it was held to have been fatal error for the court, on a trial for murder, to order the exclusion from the court room of all except "respectable citizens." This, it was claimed, gave the court officers what amounted to a power of arbitrary selection of persons to be admitted. Under it all the prisoner's friends might have been excluded and partisans of the prosecution admitted. It appeared that the public was quite generally excluded from the court room, although it was not over-crowded and there were vacant seats. Though the court went to considerable length in reversing in this case, its action was probably justifiable. In the California case it appeared that during the progress of a criminal trial the court made an order directing that the lobby without the court room be cleared of spectators, and that no person except officers of the court, reporters of the newspapers, friends of the accused, and persons necessary for her to have appear on the trial should be allowed to remain. The doors of the court room were not, however, required to be closed, and the friends of the accused and representatives of the press were allowed to come and go at will. It further appeared that such order of the court was made on behalf of the prisoner as well as to preserve order, because the presence of a crowd tended to excite her. It was held that the defendant's constitutional rights had not been infringed.

Decisions like the one recently rendered in West Virginia should be given general publicity and made the subject of the strongest adverse criticism. It is universally conceded that nothing contributes more to encourage lynching and general lawlessness than suffering actually guilty persons to cheat justice through technical defenses. We have always greatly regretted the decision of the Supreme Court of the United States in *Crain* v. *United States* (162 U. S. 625). It was therein held, Justices Peckham, Brewer and White dissenting, that before a conviction of an infamous crime can be affirmed it must appear affirmatively from the record that the accused was called upon to plead or did plead to the indictment; that this is a matter of substance and not merely of form, so as to be covered by section 1025 of the United States Revised Statutes; that "due process of law" requires that an accused plead or be ordered to plead, or, in a proper case, that a plea of not guilty be entered for him, before his trial can rightfully proceed; that the record of his conviction must show distinctly, and not by inference merely, that every step involved in due process of law, and essential to a valid trial, was taken in the trial court; otherwise the judgment will be erroneous. Justice Peckham, in his vigorous dissenting opinion, justly characterized the judgment as proceeding "not only upon the merest technicality, but also upon an unwarranted presumption of error arising from the absence of a formal statement in the record showing that the defendant was duly arraigned and pleaded not guilty, although the inference that he was so arraigned and that he did thus plead seems to be plain from the facts which the record discloses." The authority of this decision must have been potential in preserving a spirit of servile technicality in

the administration of criminal law in the Federal courts, to say nothing of its influence upon State tribunals.—*N. Y. Law Journal.*

QUESTIONS PROPOUNDED ON THE BAR EXAMINATION AT RICHMOND, JANUARY 10, 1902.

1. What is municipal law? What constitutes the municipal law in force in this Commonwealth; from what sources derived, and where found?

2. Give five of the most important rules for the interpretation and construction of written instruments. State in what cases parol evidence is admissible to contradict the terms of a writing?

3. Define curtesy and dower, respectively; give the requisites of each and specify the difference between the two estates?

4. State effect of a deed executed in 1887 by a married woman, in which her husband did not unite, and give reasons for your answer. State on what grounds, if any, can a husband be made liable for the contract of his wife?

5. State doctrine as to dower of A's widow; (a), Upon a devise of land in fee to A with a provision in case he consents to become a candidate for Congress it shall go to B, and A consents; (b), Where A is engaged in the mercantile business as a partner of B in the city of Richmond, and they jointly own a tract of land in Augusta county, purchased with the profits from their Richmond business; and (c), Where A dies, no living issue having been born of the marriage?

6. Where there is a decree for a divorce *a mensa et thoro*, what are the powers of the court with reference to the children and to property rights?

7. A owns a farm upon which he gives a deed of trust to secure $5,000 in which his wife unites; the farm is subsequently sold to satisfy the deed of trust, and brings $10,000. The wife agrees to take the commuted value of her dower, what sum forms the basis for ascertaining the value of such dower? Give reasons for your view.

8. A gives a deed of trust on June 8, 1901, to B as trustee, to secure a note for $500 payable one year after date, which is recorded on December 3, 1901. C brings suit against A and has the same docketed ready for trial on Nov. 6, 1901, the first day of the term of the court, but the suit is contested, and it cannot be tried until Dec. 7, 1901, when he obtains judgment against A for $500. Which has priority of lien on the land on which the deed of trust was given, the noteholder, or C? Give reasons.

9. B, a householder and head of a family, executed and had recorded his deed claiming one hundred acres of land as a homestead; subsequently he sells and conveys the land to C, for a valuable consideration, by deed in which his wife does not unite. Afterwards B and his wife unite in a suit to have set aside the deed to C. What are the rights of the parties? Give reasons for your answer.

10. Define (1), a vested remainder; (2), a contingent remainder. What marked characteristic always distinguishes a vested remainder from one that is contingent? What kind of estate do the children take under the following clause of a will: "I give to my wife all of my estate for her natural life, and then to

be divided among my children by will or otherwise as she (my wife) may deem best and right." Give reasons for your view.

11. A devises real property to his son B for life, and what remains at B's death to go to D, another son of A, in fee simple. B dies leaving the property devised by A just as it was upon the death of A. B dies intestate, leaving a widow and four children; have they any right in the property in question? Give reasons.

12. Define jointure at common law. When is it an absolute bar to dower?

13. State the doctrine applicable in case of grant to A of Blackacre on condition that he shall never sell his estate of Whiteacre; to grant on condition that grantee shall hold the estate [free] from liability for debts; to grant to C. &. O. Ry. Co. on condition never to sell; to grant to A for one hundred years on condition never to sell.

14. Give the several classes of indirect trusts, with an example of each class; and when must a purchaser from a trustee see to the application of the purchase money?

15. What is the doctrine of part performance, and when will it be enforced?

16. When can a defendant interpose the defence of a purchaser without notice in a court of equity?

17. What must a vendee prove in order to obtain a rescission of a contract upon the ground that it was procured by fraudulent representation of the grantor?

18. What is the doctrine, and the reason therefor, in regard to bargains made with expectant heirs and remaindermen during the lifetime, and without the knowledge of parent or ancestor, in England, and also doctrine in Virginia?

19. What is the doctrine as to an infant's right to avoid a contract made by him, where he has made false representations as to his age at the time of entering into the agreement?

20. What is the result if a trustee commits a breach of trust? When is breach regarded as waived; what effect does time have on breach, both where there is an express trust, and where there is a trust by construction of equity?

21. State the doctrine of resulting trusts; the circumstances under which it arises; the character of proof necessary to establish such a trust; whether parol proof is admissible for the purpose, and the court having jurisdiction of the subject?

22. What is the doctrine in Virginia as to power of a court of equity to enforce a charitable trust, and difference, if any, between English doctrine and doctrine in this State?

23. A trustee in a deed of trust to secure a debt, sells the property. Before whom must he settle his accounts, within what time must he settle them, and what is the penalty that can be imposed on him for not settling them in the required time?

24. What are the actions given for the recovery of real estate; and when may each be brought? State the plea in each action.

26. Can one joint-tenant recover in an action of ejectment in his own name, as sole plaintiff, the interest of himself and his co-tenants? Suppose, in such a suit,

the plaintiff fails to prove what his proportion of the land is, what must be the judgment?

26. Does an unsigned attestation clause invalidate an olograph will, signed by the testator?

27. In what cases has the Supreme Court of Appeals original jurisdiction? What class of duties are enforced by mandamus? What is the amount that must be involved in a litigation, in order that the case may be taken to the Court of Appeals?

28. Give some instances where cases can be taken to the Court of Appeals regardless of the amount involved?

29. State the distinction in origin, in nature, function and application between an appeal and a writ of error?

30. State doctrine at common law, and also in Virginia, as to who should sue on a bond of $1,000 given by A to B for benefit of C?

31. Give some of the defences, if any, that can be made to a negotiable note by the maker, as against an innocent holder for value without notice, to whom it has been negotiated before maturity?

32. A gives B his negotiable note on Jan. 19, 1901, payable one year after date. C steals the note from B and negotiates it to D on July 1, 1901, for value, and without notice of its being stolen. Can D collect the note from A?

33. Under a general covenant for renewal of a lease, for how long can the lessor be compelled to renew? If the tenant holds over without renewal, when can the landlord demand possession and what steps are necessary to entitle him to possession?

34. State the remedies for the collection of rent? Give the proceedings both when it is payable in money and when in part of crop?

35. What are dying declarations? Must they be sworn to by the party making them in order to be admissible as evidence?

36. Under what circumstances may a party who has engaged in a mutual combat be excused for taking the life of the other upon the ground of self defence?

37. A steals from B's person $10.00 in money. Of what offence is he guilty? Suppose A picks up the money on the street, knowing that B had just dropped it, and appropriates it to his own use, of what offence would he then be guilty?

38. Define embezzlement, and state whether it is a common law or statutory offence.

Define burglary; larceny, simple and compound, petit and grand; and name the respective tribunals which in Virginia have original jurisdiction of offences?

39. If you were defending a party charged with murder, and learned after a verdict of guilty is rendered, but before judgment thereon, that one of the jurors had said before the trial that he knew the accused to be a bad character and if put upon the jury he would be for hanging him, what steps would you take upon behalf of your client?

Upon bringing the facts stated to the attention of the court in a proper mode a new trial is denied the accused, what steps would you then take?

40. Name the different grades of homicide and define a reasonable doubt as applied to a criminal prosecution?

SUCCESSFUL APPLICANTS.

We print below a list of the successful applicants (thirteen out of twenty-three candidates), with the respective law schools attended, so far as ascertainable on short notice:

Altizer, M. H. (Univ. Va.), Salem.
Branch, Austin (Univ. Va.), Augusta, Ga.
Davis, Richard J. (Univ. Va.), Norfolk.
Elliott, M. C. (Univ. Va.), Wilmington, N. C.
Johnson, Charles M., Hadensville.
McAllister, W. A., Newport News
Martin, John G. (B. L. Univ. Va.), Norfolk.
Moore, T. V. (Richmond Coll.), Richmond.
Stauffer, W. T., Newport News.
Triplett, Roderick (Univ. Va. Summer Law School), Port Norfolk.
Wilkins, F. T. (Univ. Va.), Bridgetown.
Wilkins, John T., 3d, Bridgetown.
Wingfield, G. A., Roanoke.